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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 610

IRVING STRAUSS, HAROLD SOLODAR, HARRY SCHILLING, CHARLES KRAUSS, and SAMUEL W. BEHRMAN,
Appellants,

v.

THE UNIVERSITY OF THE STATE OF NEW YORK, ALEXANDER J. ALLEN, JR., GEORGE HOPKINS BOND, JOHN F. BROSNAN, EDGAR W. COUPER, EDWARD R. EASTMAN, CAROLINE WERNER GANNETT, JACOB L. HOLTZMANN, W. KINGSLAND MACY, DOMINICK F. MAURILLO, WELLS V. MOOT, JOHN P. MYERS, ROGER W. STRAUS, and WILLIAM J. WALLIN as members of the Board of Regents and HAROLD R. BARNES, F. EARLE CUSHING, HAROLD J. FISHER, LELAND D. LYON, and CLARENCE C. ROGERS as members of the State Board of Examiners in Optometry,
Appellees.

On Appeal from the Court of Appeals of the State of New York

PETITION FOR REHEARING

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 310

IRVING STRAUSS, HAROLD SOLODAR, HARRY SCHILLING, CHARLES KRAUSS, and SAMUEL W. BEHRMAN,
Appellants,

v.

THE UNIVERSITY OF THE STATE OF NEW YORK, ALEXANDER J. ALLEN, JR., GEORGE HOPKINS BOND, JOHN F. BROSNAN, EDGAR W. COUPER, EDWARD R. EASTMAN, CAROLINE WERNER GANNETT, JACOB L. HOLTZMANN, W. KINGSLAND MACY, DOMINICK F. MAURILLO, WELLS V. MOOT, JOHN P. MYERS, ROGER W. STRAUS, and WILLIAM J. WALLIN as members of the Board of Regents and HAROLD R. BARNES, F. EARLE CUSHING, HAROLD J. FISHER, LELAND D. LYON, and CLARENCE C. ROGERS as members of the State Board of Examiners in Optometry,
Appellees.

On Appeal from the Court of Appeals of the State of New York

PETITION FOR REHEARING

Appellants pray that this Court grant rehearing of its decision of January 20, 1958.

STATEMENT

Appellants are five optometrists who brought suit on behalf of themselves and all others similarly situ-

ated; and Appellees are public officials of New York State who are concerned with the regulation of the profession of optometry. On June 15-16, 1950, a regulation was adopted by the Board of Regents, which restricted the use of advertising displays and signs by licensed and registered optometrists, by defining their use as unprofessional conduct and thereby subjecting offending optometrists to loss of license. The regulation applied solely to optometrists; it did not apply to persons in any of the other professions or businesses performing essentially the same functions or services.

On January 15, 1951, official notice was given that "rigid enforcement" of this regulation would be undertaken on April 15, 1951 (R. 16). On March 29, 1951, Appellants commenced this suit seeking a declaration that under both state and federal law the regulation was unconstitutional and illegal, and an injunction against its enforcement (R. 3 *et seq.*). An injunction *pendente lite* was granted on July 13, 1951 (R. 95), and affirmed on appeal on November 17, 1952. 280 App. Div. 1017. Thereupon Appellees moved for judgment on the pleadings, but their motion was denied (R. 98); and the denial was affirmed on appeal on November 12, 1953. 282 App. Div. 593.

The case was argued before the Court of Appeals on January 24, 1957, on the basis of the 1950 regulation only. On the following day, apparently as a result of the argument, the Board of Regents adopted an amendment to the regulation.

On March 8, 1957, the Court of Appeals issued its decision and judgment sustaining the validity of the regulation *as amended*. This decision came as a complete surprise; for Appellants had never had any

opportunity whatever to be heard on the amended regulation. In each of the three New York State Courts, the evidence presented, the arguments made, the briefs submitted, and the facts and the issues of law considered, were all directed towards the 1950 regulation. But on the amended regulation, no evidence was ever taken, no briefs were ever submitted, no argument was ever made.

GROUNDS FOR REHEARING

In their Jurisdictional Statement, Appellants presented two distinct and separate issues: first, whether the Court below denied Appellants due process of law in sustaining the validity of the amended regulation without affording Appellants any opportunity to be heard thereon; and, second, whether a regulation limited solely to optometrists was a violation of the requirements of the equal protection clause.

This Court's *per curiam* decision dismissing the appeal "for want of a substantial federal question" drew no distinction between these two issues. Certainly the decision is not appropriate to the first issue.

Saunders v. *Shaw*, 244 U.S. 317, is directly applicable to the situation presented by the facts of this case. In the *Saunders* case, this Court unanimously reversed a decision of a state supreme court which relied upon matters as to which the appellant in that case had never been given a hearing. This Court declared that a state court could not change the issue being adjudicated without first affording each party opportunity to be heard, and that failing to afford such an opportunity violated the requirements of the Fourteenth Amendment. The very procedure this

Court struck down in *Saunders* v. *Shaw* has apparently now been authorized here.

It was the judgment of every member of this Court in the *Saunders* case that the failure to afford a litigant a hearing on an issue changed since the trial was a clear violation of the Fourteenth Amendment. It is inconceivable that this principle, which has never since been questioned, can be disregarded, without even raising a substantial federal question. Surely, the meaning of due process of law has not changed so drastically since 1917 that what was an obvious violation of the Fourteenth Amendment then does not even present a substantial federal question today. Indeed, if it can be held that such an issue does not today present a substantial federal question, it can only be because the issue has already been definitively decided by this Court in *Saunders* v. *Shaw*—in favor of Appellants.

The objections raised to the original regulation obviously had sufficient merit to require lengthy and serious consideration by the lower New York courts. As noted, an injunction against the enforcement of the regulation was granted by the Supreme Court, and sustained by the Appellate Division. 280 App. Div. 1017. When Appellees contended that the allegations of the complaint could be determined without trial on the pleadings alone, their contention was rejected by the Supreme Court, and this too was sustained on appeal. 282 App. Div. 593. Neither the Supreme Court nor the Appellate Division was disposed to decide the issues of the case summarily; there was no suggestion that any of Appellants' contentions were not deserving of full judicial consideration and review. Even the decision on the merits—which was against Appellants—was affirmed by a divided court; the dis-

senting opinion raised a number of objections relating to the vagueness and obscurity of the original regulation. 2 App. Div. 2d 179.

In striking contrast to the orderly and careful judicial consideration given the original regulation, only the most perfunctory review was accorded the amended regulation. Appellants have not only been denied any opportunity to be heard with regard to it, but have in effect been denied even the opportunity to make allegations respecting it.

It is not clear whether the Court below believed that the amended regulation corrected the deficiencies of the original regulation, met the objections of the Appellants, or conformed to the strictures of the dissenting opinion in the Appellate Division. But whatever the motivations of the Court below, they could not compensate for the basic constitutional deficiency that Appellants have never had any opportunity to be heard on the issue decided.

Assuming *arguendo* that Appellants' challenges to the validity of the amended regulation raise only issues of state law and do not raise a substantial federal question, Appellants still have a constitutional right to be heard in state court proceedings. This opportunity they have never had, and surely the denial of that right presents a substantial federal question.

To declare that this record fails to present a substantial federal question is (a) to overlook the obviously serious question of procedural due process presented by the record; (b) to acquiesce in an extraordinary limitation on the rights of litigants in state courts; and finally (c) to cast a shadow upon the sound and salutary principles of *Saunders* v. *Shaw*.

CONCLUSION

It is respectfully submitted that the decision entered in this case should be clarified in the light of *Saunders* v. *Shaw*, 244 U.S. 317. For the reasons stated herein, Appellants pray that a rehearing be granted, and either that the question of jurisdiction be postponed until argument on the merits, or that probable jurisdiction be noted at least on the issue of procedural due process.

Respectfully submitted,

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I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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Attorney for Appellants